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March 11, 2019

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Via Email: [56356-03599432@requests.muckrock.com](mailto:56356-03599432@requests.muckrock.com)

Re: Freedom of Information Act Request (#FO-18-0077)

Dear T.J. Kenney:

Please be advised that this is a final response to your request dated June 17, 2018, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with “a copy of [r]eport of Prohibited Personnel Practice, OSC File No. MA-14-3308 (Teresa Gilbert).” Your request has been processed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a.

OSC identified fourteen (14) pages of responsive records. We are releasing 14 pages in part pursuant to FOIA Exemptions (b)(6) and (b)(7)(C).

- FOIA Exemption 6 protects information if disclosure would constitute a clearly unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(6).
- FOIA Exemption 7(C) protects law enforcement information if disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(7)(C).

You have the right to appeal this determination under the FOIA. An appeal must be made in writing and sent to OSC’s General Counsel at the address shown at the top of this letter or by email to [FOIAappeal@osc.gov](mailto:FOIAappeal@osc.gov). The appeal must be received by the Office of General Counsel within ninety (90) days of the date of this letter.

If you have any questions or you require dispute resolution services, please feel free to contact Mahala Dar, OSC’s Chief FOIA Officer and acting FOIA Public Liaison, at [mdar@osc.gov](mailto:mdar@osc.gov) or (202) 804-7060. Please reference the above tracking number when you call or write. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer.<sup>1</sup>

Thank you,

/s/  
Mahala Dar, Esq.  
Clerk

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<sup>1</sup> Office of Governmental Information Services (OGIS), National Archives and Records Administration 8601 Adelphi Road, Room 2510, College Park, MD 20740-6001; [ogis@nara.gov](mailto:ogis@nara.gov) (Email) 202-741-5770 (Office) 1-877-684-6448 (Toll Free) 202-741-5769 (Fax)



U.S. OFFICE OF SPECIAL COUNSEL

## Memorandum

U.S. Office of Special Counsel  
Report of Prohibited Personnel Practice  
OSC File No. MA-14-3308 (Teresa Gilbert)

(b)(6):  
OSC Investigator

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June 8, 2017

This report represents the deliberative attorney work product of the U.S. Office of Special Counsel (OSC) and is considered privileged and confidential. Any release of information beyond persons specifically designated by OSC to have access to its contents is prohibited. All Freedom of Information Act inquiries regarding this report should be referred to OSC's Office of General Counsel at 202-254-3600.

## INTRODUCTION

This report by the U.S. Office of Special Counsel (OSC) contains the investigative findings in OSC File Number MA-14-3308, a complaint of prohibited personnel practices filed by Teresa Gilbert against the U.S. Department of the Army. Gilbert was a health technician in Infection Prevention and Control at the Womack Army Medical Center (WAMC). She alleged that the Army - principally through the (b)(6); (b)(7)(C) and her first-line supervisor, (b)(6); (b)(6); (b)(7)(C) - retaliated against her for making disclosures to management officials, the Joint Commission, and the Office of the Inspector General.

The evidence obtained in OSC's investigation demonstrates that (b)(6) retaliated against Gilbert. From January to May 2014, Gilbert made numerous disclosures regarding WAMC's failure to follow established infection control protocols and directives and (b)(6); lack of qualifications to serve as (b)(6); (b)(7)(C). In response, (b)(6) changed Gilbert's duties, detailed her out of infection control, placed her under investigation, and ultimately sought her removal. In September 2015, Gilbert settled her complaint for corrective action against the Army.<sup>1</sup> This report summarizes OSC's investigative findings for potential disciplinary action against (b)(6). OSC concludes that (b)(6) engaged in prohibited personnel practices in violation of 5 U.S.C. §§2302(b)(8) and (b)(9) by taking personnel actions against Gilbert in retaliation for her protected activity. OSC recommends that the Army take appropriate disciplinary action against (b)(6) as provided in 5 U.S.C. §1215.

## STATEMENT OF FACTS

### A. Background

WAMC is one of the Army's largest military hospitals, providing medical services to more than 200,000 people at Ft. Bragg, NC. Ex. 51(B). In 2008, WAMC hired Teresa Gilbert as a GS-8 health technician in Infection Prevention and Control. Ex. 51(A), p. 2. At the time, Gilbert was board-certified by both the American Society of Clinical Pathologists and the American Medical Technologists Organization. During her tenure at WAMC, she also became board-certified as an Infection Preventionist by the Board of Infection Control and Epidemiology. Ex. 51(A).

In September 2013, WAMC commissioned a mock survey of health and safety practices from health care consulting firm (b)(6); (b)(7)(C) in order to prepare the hospital for a May 2014 official inspection by the Joint Commission. Ex. 38(3A). The Joint Commission is the nation's oldest and largest accreditation entity for health care organizations, setting national standards and providing accreditation for health care institutions across the country. The

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<sup>1</sup> Because of issues regarding effectuation of the original settlement agreement, Gilbert entered into a final settlement of her claim for corrective action in January 2017.

Department of Defense mandates that military hospitals, such as WAMC, meet or exceed the standards of the Joint Commission. Ex. 51(D1).

On October 7, 2013, (b)(6); issued its survey results identifying serious infection control failures, and finding that WAMC staff failed to follow infection-control policies and sterilization guidelines, placing hospital patients at serious risk for infection. Ex. 38(3A). For example, (b)(6); found laryngoscope blades out of their sterile packages, temperature logs that did not record the appropriate temperature for storing breast milk, ophthalmoscopes covered in dirt, dirty and unsterilized ophthalmic equipment, deficient reporting of infection control data, and sterilization and safety issues with urology equipment. Ex. 38(3A), pp. 20-22. (b)(6) determined that these unsafe conditions resulted from poor hospital leadership, posed an immediate threat to life, and likely would justify the Joint Commission's denial of preliminary accreditation. Ex. 38(3A), pp. 21-22. "The findings . . . are extremely serious and put patients at risk. Immediate correction is needed," the report stated. Ex. 38(3A), p. 22.

Notwithstanding the alarming findings of (b)(6); WAMC leadership took no effective action to correct the infection control failures. Neither WAMC Commander (b)(6); (b)(7)(C), nor (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) took the survey results seriously. (b)(6); later acknowledging (b) did not "have an appreciation for the significance of the mock survey results," Ex. 38 (12B), and (h)(7) admitted that following the survey the "hospital went around acting like it was business as usual." Ex. 38 (14E), p.5. The hospital continued to be in non-compliance with infection control policies and procedures throughout Fall 2013, thereby endangering all patients at the facility. Ex. 59, p. 3. Though Gilbert repeated her concerns to both (b)(6) and (h)(7), on several occasions, they dismissed her concerns and did nothing to address or correct the reported deficiencies and violations. Ex. 40, pp. 4-5; Ex. 59, p. 3.

On January 4, 2014, WAMC assigned (b)(6); (b)(7)(C) as (b)(6); (b)(7)(C) (b)(6) at WAMC and Teresa Gilbert's direct supervisor. Ex. 35, Tab A, p. 34. (b)(6) had no prior experience or training to serve as (b)(6) nor was (b) board-certified in infection control, Ex. 43(A), p.7, as required by accreditation protocols. When (b) was assigned, the plan apparently was that (b)(6) obtain the necessary training while serving in the position, *id.*, but during the nine months (b) served as (b) (b) never did. Ex. 35(A), pp. 20-21, 63; Ex. 38(12A); Ex. 40, p. 3.

**B. (b)(6); Changes Gilbert's Working Conditions After She Challenges (b)(6);'s Qualifications and Provides the (b)(6); Survey Results to the Joint Commission**

Shortly after (b)(6)'s appointment, Gilbert had several discussions with (b)(6) regarding the Infection and Control Unit's most significant challenges. Ex. 32, p. 85; Ex. 35(A), p. 18; Ex. 35(B), pp. 51, 69; Ex. 40, p. 3. She told (b)(6) that the hospital continued to fail to address the serious lapses in infection control uncovered by the (b)(6) survey in October 2013. Ex. 40, p. 4. She also on multiple occasions expressed concern regarding (h)(7)'s lack of experience in infection control and lack of training to serve as (b)(7) of the unit. Ex. 35(A), p. 18; Ex. 40, p. 3; Ex. 43(A), p. 7. When (b)(6) became (b) Gilbert was the only person left in the unit. Ex. 43(A), p. 16. And although she had training in infection control and could identify the problems, Gilbert had

no authority as a GS-8 to solve them. Gilbert believed the nature and extent of the infection control problems at WAMC required a (b)(6) who was board-certified and trained in infection control, knowledgeable about the issues, and capable of solving them. Ex. 35, pp. 20-21. The Army echoed these same concerns in a subsequent investigation at Womack. Ex. 38(1A), pp. 8-9.

Based on these concerns, Gilbert filed a complaint with the Office of Inspector General (OIG) in January 2014, repeating her disclosures about the hospital's failure to follow proper sterilization processes and (b)(6)'s lack of experience and training. Ex. 43(C), p. 50; Ex. 43(A), p. 8. On January 14, 2014, Gilbert disclosed the results of the (b)(6) mock survey to the Joint Commission's Office of Quality Monitoring, and alerted them to her concern regarding (b)(6)'s lack of qualifications to lead the unit. Ex. 1(D); Ex. 43(C), p. 11. Gilbert told the Commission that WAMC had ignored the problems documented in (b)(6)'s mock survey, and that Gilbert believed the hospital had placed its patients' health and safety in serious danger through unnecessary exposure to infection and infectious diseases. *Id.*

The Joint Commission responded to Gilbert the same day, assuring her that it would examine WAMC's infection control practices and policies during the survey. Ex. 1(H). After receiving Gilbert's disclosures, the Joint Commission advanced its accreditation survey of WAMC by two months. Ex. 43(A), p. 5.

On January 24, 2014, Gilbert told (b)(6) that she had disclosed the (b)(6) survey results to the Joint Commission. Ex. 1(D); Ex. 7, p. 4; Ex. 40, p. 4; Ex. 52, p. 26. Immediately after this, (b)(6) began excluding Gilbert from routine meetings, decisions, and important projects in the unit. Ex. 43(C), pp. 20-23; Ex. 46, pp. 1-2; Ex. 67, pp. 1-3. (b)(6) no longer allowed Gilbert to attend the Department of Nursing/Daily Nursing Report that convened to discuss the emergency room patient population and pending infection issues. Ex. 67, p. 1. (b)(6) no longer allowed her to attend the Commander's Morning Report or the Infection Control Representative Meetings. *Id.* (b)(6) also excluded Gilbert from the Functional Management Team (FMT) meetings that occurred monthly to review the hospital's compliance with JC standards and qualification for accreditation. Ex. 38(9C), pp. 1-2; Ex. 52, pp. 20-23; Ex. 67, pp. 1-2. As was later told by (b)(6); (b)(6); who was on detail in IC, (b)(6) felt Gilbert could not be trusted because "she sent the mock survey to joint commission and now they are after us." Ex. 52, p. 26.

### **C. (b)(6); Excludes Gilbert From Joint Commission Activities and Imposes a Half-Day Schedule Following the Joint Commission's Expedited Review**

The Joint Commission originally had scheduled its accreditation review of WAMC for May 2014. Based on Gilbert's disclosures, however, the Joint Commission advanced the survey date by two months. On March 11, 2014, the Joint Commission notified WAMC that it would begin the accreditation survey in one week's time, on March 18, 2014. Ex. 38(12B), p. 8; Ex. 43(A), p. 5.

On the first day of the survey, (b)(6); wrote to the Northern Regional Medical Command (NRMC) that, "[O]ne of our disgruntled staff [Gilbert] contacted the JC and told them

that our IC lead is not qualified to be in that role. Ex 38(7B). We'll see what the JC has to say about all this, however the acting IC nurse is (b)(6); and (b) is doing an outstanding job." *Id.*

On March 21, 2014, the Joint Commission finished its on-site survey and provided an out-brief to WAMC senior officials. Ex. 16(C). The Joint Commission reported deficiencies of such significance that immediate changes at the hospital were required. *Id.* The Army Surgeon General intervened, and ordered WAMC's leadership to stand down. Ex. 35(A), p. 57. U.S. Army Medical Command (MEDCOM) placed elective surgeries at the hospital on hold for several days until protective procedures were established. Ex. 7, p. 4. As (b)(6) explained, "[the Joint Commission and WAMC leadership] were in communication with...the Army Surgeon General...because they were discussing all the issues and trying to decide if they were going to shut down the hospital..." Ex. 35(B), p. 29. (b) too confirmed fallout from the Joint Commission's out-brief, testifying:

Finally, the Joint Commission calls back, and they're saying we have a serious concern that could potentially be in the threat of life category. . . . [T]he Joint Commission representative called and says . . . you've got some major issues with infection control. Your command is involved. Next thing I know is when I get back to work on Monday [March 24, 2014] (b)(6); (b)(6) is here, and everybody is here and it's a full assault on Womack, and it's just—you know it's horrific, and then, the nightmare began.

Ex. 38(13A), p. 18-19.

Ultimately, four members of WAMC's leadership, including (b) and (b)(6);, received reprimands based on the Joint Commission's findings. Ex. 36(A)-(B). (b) received a reprimand for dereliction of duty:

You had first-hand knowledge that the WAMC infection control problem was not doing well and you did not establish an effective structure to monitor corrective actions following two mock surveys that highlighted problem areas.... You failed to seek assistance from either the Northern Regional Medical Command (NRMC) or MEDCOM. Additionally, you declined offers of assistance from NRMC, erroneously claiming all was well with the infection control program.

Ex. 36(A), p. 1.

(b)(6);'s disciplinary action faulted (b) for failing to mitigate against the infection control problems despite (b)(6)'s knowledge of them:

With your over 20 years of service to Army Medicine, you knew the importance of infection control and knew of issues with infection control at Womack, yet your command failed to have a structure in place to mitigate the shortcomings revealed in two



mock surveys leading up to the Joint Commission survey. As a result, I have lost all faith in your ability to lead.

Ex. 36(B).

During and immediately following the Joint Commission survey, (b)(6) refused to allow Gilbert to join FMT and Joint Commission meetings, although Gilbert was arguably the most knowledgeable person in the area of infection control. Ex. 42(A)-(D); Ex. 43(C), p. 14. Gilbert complained about her exclusion to (b)(6) and other agency officials, arguing that her knowledge and experience would help the hospital address the Joint Commission's findings. Ex. 42(A)-(D); Ex. 43(C), pp. 13-14; Ex. 43(D), p. 5. But (b)(6) did not reverse (b)(6) actions and no hospital official intervened. Ex. 2 (B2); Ex. 38(8A)-(8B), (9A); Ex. 42(D), pp. 1-2.

Just two weeks after the Joint Commission finished its survey, (b)(6) notified Gilbert that (b)(6) was restricting her to a half-day work schedule and would require her to take four hours of leave each day. Ex. 2(B6)-(B7); Ex. 42(F); Ex. 43(D), p. 6. Gilbert protested the action unsuccessfully. Ex. 34(L); Ex. 40, pp. 6-7; Ex. 42(F)-(G); Ex. 43(C), pp. 23-47.

#### **D. Gilbert's Additional Disclosures Result in an Escalating Series of Personnel Actions Ending in a Proposed Removal**

Gilbert continued to make disclosures regarding the ongoing deficiencies in the infection control unit, in addition to which she added numerous concerns regarding (b)(6)'s retaliatory treatment. On March 24, 2014, for example, Gilbert sent a series of emails to (b)(6), (b)(6), (b)(6) and other agency officials in which she described (b)(6)'s attempt to marginalize her by withholding necessary information. Ex. 2 (B2); Ex. 38 (8B), (9A). Gilbert said that (b)(6) was abusing (b)(6) authority, creating a hostile work environment, and creating an atmosphere of secrecy and exclusion. *Id.* Within four days, (b)(6) sent an email to Gilbert and other IC staff ordering them not to communicate via email with each other, but to direct all emails to (b)(6). Ex. 2 (B3).

On April 24, 2014, Gilbert cooperated with an Army AR 15-6 investigation of the findings by the Joint Commission. Ex. 38(14G), p. 5. Gilbert disclosed to investigators additional infection control failures at the hospital and (b)(6)'s retaliatory actions against her. Ex. 43(C), pp. 20-24. Gilbert also disclosed that the hospital had failed to correct deficiencies identified by the Joint Commission, telling investigators that two dirty cystoscopes with biological residue had been sent to the operating room for use, and that the packaging serial numbers and the numbers on the scopes did not match. Ex. 43(C), p. 49.

On May 5, 2014, Gilbert contacted the Joint Commission again to disclose that WAMC's infection control program continued to deteriorate. Ex. 1(H); Ex. 43(C), p. 12. She relayed a complaint from a doctor who noticed new incidents of "visible matter" and nonmatching serial numbers on several scopes. Ex. 1(H). She also filed a second complaint with the OIG alleging that (b)(6) retaliated against her by excluding her from meetings, restricting her work to half days, and requiring her to use four hours of (b)(6) leave per day. Ex. 1(G); Ex. 69(L)-(M). In late May 2014,

Gilbert also contacted the office of Representative Renee Ellmers (R-NC) and reported (b)(6)'s retaliation. Ex. 2(C1); Ex. 61(A)-(B).

On May 30, 2014, the Army released its Report of Investigation (ROI or Report) for the AR 15-6. Ex. 38(1A). The investigation found that (b)(6) was unqualified, had insufficient training and was too inexperienced to serve as (b)(6): (b)(7)(C). Ex. 38(1A), pp. 8, 21. The Army ROI concluded that the lack of a qualified (b)(6) was the “primary causal factor and most common reason given to investigators” to explain the hospital’s failures. Ex. 38(1A), p.8. The Report stated that, “[V]irtually everyone interviewed at WMAC as part of this investigation opined that had a qualified (b)(6) been in charge of preparing the hospital to comply with TJC infection control requirements, it would have been unlikely that the deficiencies would have been so serious and, if they had, they would have been promptly corrected.” Ex. 38(1A), p. 21.

Following the Army ROI, (b)(6) initiated a number of personnel actions against Gilbert. Shortly after May 30, 2014, (b)(6) charged Gilbert twenty-eight hours of Absent Without Leave (AWOL), principally for not submitting leave requests for the four hours of leave that (b)(6) had directed her to use daily. Ex. 1(E), p. 2; Ex. 40, p. 7. On July 14, 2014, (b)(6) issued Gilbert a Letter of Warning stating that Gilbert needed to get past her negative view of (b)(6) and asserting that Gilbert's emails were hurting employee morale. Ex. 1(F). (b)(6) admitted to OSC that (b)(6) warning letter stemmed from Gilbert's allegations that (b)(6) had retaliated against her – specifically that Gilbert accused (b)(6) of “stuff” and continued to make accusations against (b)(6). Ex. 35(A), p. 77; Ex. 35(B), pp. 108-109. And on July 24, 2014, (b)(6) terminated Gilbert's access to patient files, detailed her out of infection control and placed her under investigation based on an allegation that she had illegally accessed and shared patient information. Ex. 10(D); Ex. 18(A); Ex. 35(A), p. 12; Ex. 35(B), pp. 88-89; Ex. 43(A), p. 18; Ex. 43(D), p. 9.

The allegation that Gilbert had accessed and shared patient information came from (b)(6) who claimed that (b)(6); (b)(7)(C) – Gilbert’s (b)(6); (b)(7)(C) – had reported that Gilbert shared (b)(6);’s patient information with (b)(6), without (b)(6)’s permission. Ex. 35(A), pp. 6-12; Ex. 35(B), pp. 84-88; Ex. 43(A), p. 12-13. WAMC assigned (b)(6); (b)(6) to investigate the allegation. Ex. 26, p. 2. (b)(6) met with (b)(6) and (b)(6). IC Officer and later (b)(6)’s successor. Ex. 26, p. 2. (b)(6) interviewed the patient, (b)(6); (b)(6), who had allegedly made the complaint against Gilbert. *Id.* (b)(6), however, denied contacting (b)(6) or making a HIPAA complaint against Gilbert. Ex. 24, p. 1. (b)(6) told (b)(6) (b)(6) had no concerns about Gilbert and did not think the matter required an investigation. Ex. 10(C); Ex. 24, p. 1; Ex. 26, pp. 2-3. (b)(6) also confirmed the same to OSC. Ex. 24, p. 1. Furthermore, (b)(6)’s (b)(6); (b)(6); (b)(6); told an Army investigator that Gilbert had not disclosed (b)(6)’s medical information to (b)(6) and that (b)(6) had not contacted (b)(6) about the allegation. Ex. 43(F), p. 2.

(b)(6) told OSC that (h) briefed (b)(6) on the results from (b)(6); (b)(6)'s interview. Ex. 26, pp. 4-5. Instead of dropping the matter as (h)(6) requested, however, (h)(6) pressed forward and told (b)(6) to conduct an audit of Gilbert's work for HIPAA violations. Ex. 26, p. 4. The evidence showed that Gilbert routinely reviewed patient records as part of her duties to ensure that patients received correct medication for drug-resistant infectious diseases. Ex. 7, p. 1. Gilbert accessed hundreds of patient records daily, depending on the number of patients admitted into the



hospital or seen in the Emergency Department. Ex. 7, p. 1; Ex. 32, pp. 30-32; Ex. 43(C), p. 51. (b)(7) was a patient at WAMC. Ex. 7, p. 2; Ex. 26, p. 5. Thus, (b)(6)'s audit verified that Gilbert reviewed (b)(7)'s treatment records for approximately two minutes, but concluded that Gilbert's review could have been in the proper course of business. Ex. 10(B); Ex. 26, p. 4.

Despite (b)(6)'s inconclusive finding, (b)(6) worked with (b)(7) and (b)(6): , personnelist, to seek Gilbert's removal based on the (b)(7) incident. Ex. 43(A), pp. 14-16. (b)(6) however, could not finalize Gilbert's proposed removal before (b)(7) transfer from WAMC. Ex. 32, pp. 21, 24, 85; Ex. 64, pp. 109-110. The task was reassigned to (b)(6), who expressed concerns because (b)(6) was not Gilbert's supervisor and had not been involved in (b)(6)'s investigation. Ex. 64, pp. 73, 86-87, 108-109. Nonetheless, (b)(6); told (b)(7) to sign Gilbert's proposed removal and (b)(6) did on October 20, 2014. Ex. 64, pp. 78-79, 81-87, 90-91; Ex. 5; Ex. 65(A)-(B). A few days later, (b)(7) and (b)(6) decided that it was improper for (b)(6): to propose Gilbert's removal as (b)(6) was not Gilbert's supervisor. Ex. 32, p. 22; Ex. 64, pp. 73, 107-109, 116. They rescinded the proposed removal and (b)(7) reissued it with the same charges on November 10, 2014. Ex. 14(A)-(B).<sup>2</sup> In addition to the charges regarding (b)(7), the second proposed removal added a charge that Gilbert violated HIPAA by having accessed her own medical records. *Id.* (b)(6), however, confirmed to OSC that accessing one's own medical records is not a violation of HIPAA. Ex. 26, p. 5. OSC obtained a voluntary stay of Gilbert's removal from the agency on December 17, 2014, and the Army never effected it. Ex. 60(A)-(B).

## LEGAL ANALYSIS

It is a prohibited personnel practice to take or threaten to take a personnel action because an employee discloses information that she reasonably believes evidences a violation of an agency rule or poses a specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). In order to establish a violation of the statute, four elements must be present: (a) protected disclosure; (b) personnel action; (c) knowledge; and (d) causal connection. To establish a causal connection in a disciplinary action case, preponderant evidence must show that a protected disclosure was "a significant motivating factor in the action, even if other factors also motivated the decision." 5 U.S.C. § 1215(a)(3)(B). The responsible employee, however, may avoid discipline if "the employee demonstrates, by preponderant evidence, that the employee would have taken, or threatened... the same personnel action, in the absence of such protected activity." *Id.*; S. Rep. No. 112-155, at 14-15 (2012) (discussing significant factor test).

In this case, as we demonstrate below, the evidence is clear that Gilbert made protected disclosures, that (b)(6) had knowledge of those disclosures, that they were a significant motivating factor in the personnel actions that (b)(6) took against her, and that those actions would not have been taken in the absence of Gilbert's protected disclosures. Thus, OSC concludes that discipline is

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<sup>2</sup> (b)(7) testified that no one asked (b)(7) at the time whether Gilbert had legitimate reasons to access (b)(7)'s medical records. Ex. 64, p. 52. (b)(7) said that the Agency failed to examine the circumstances of Gilbert's review of (b)(7)'s records when it proposed her removal. Ex. 64, p. 64-68. Not until 2016 did anyone ask (b)(7) to analyze whether Gilbert had a legitimate reason to review (b)(7)'s records. Ex. 64, pp. 52-53. (b)(6) concluded in 2016 that there was no legitimate reason for Gilbert to be in (b)(7)'s records and an appropriate penalty would be a reprimand. Ex. 64, pp. 113-114.

warranted. While OSC lacks independent authority to discipline a member of the uniformed services for a prohibited personnel practice, OSC has statutory authority to transmit recommendations for disciplinary and other appropriate action to the head of the agency for consideration. 5 U.S.C. § 1215(c)(1).

### **A. Gilbert Made Protected Disclosures and Engaged in Protected Activity**

A disclosure is a formal or informal communication or transmission that the employee reasonably believes evidences any violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2)(D); Mithen v. Dep't of Veterans Affairs, 119 M.S.P.R. 215 (2013).

The standard for evaluating “reasonableness” is an objective one: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the information evidences an impropriety defined in the statute. Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), codified by Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. § 2302(b). An employee need not prove an actual violation to establish that she had a reasonable belief that her disclosure met statutory criteria. Stiles v. Dep't of Homeland Sec., 116 M.S.P.R. 263 (2011).

Based on the results of OSC's investigation, OSC concludes that Gilbert made protected disclosures and engaged in other forms of protected activity on multiple occasions between January and May 2014. As discussed in the facts, *supra*, at 3, 4 and 6, Gilbert provided information to (b)(6), other WAMC officials, the OIG, the Joint Commission, agency investigators, and a congressional office that evidenced specific and serious danger to patient health because of lax enforcement of infection protocols and (b)(6)'s own lack of experience and qualifications as (b)(6). The independent findings of the Joint Commission and the Army corroborate the reasonableness of these disclosures.

### **B. (b)(6); Took a Number of Personnel Actions Against Gilbert**

A “personnel action” is defined in 5 U.S.C. § 2302(a)(2)(A) and includes disciplinary or corrective actions, a detail, a decision concerning benefits, and a significant change in duties, responsibilities, or working conditions. OSC found that (b)(6) took or threatened a series of personnel actions against Gilbert, specifically: (1) excluding Gilbert from important infection control meetings and business, (2) forcing Gilbert to take leave involuntarily, (3) placing her in AWOL status, (4) issuing her a letter of warning, (5) detailing her out of infection control; and (6) subjecting her to a misconduct investigation that resulted in a proposed removal from service.

### **C. (b)(6); Had Knowledge of Gilbert's Disclosures**

(b)(6) (b)(6) was the direct recipient of many of Gilbert disclosures, including her complaints regarding (b)(6)'s qualifications. (b)(6) testified, “[F]rom the time I took the

job...Ms. Gilbert had numerous issues with me being the (b)(6)· (b)(7)(C) ... Part of her issue was I was not, quote unquote, certified in infection control....” Ex. 35(A), pp. 13-18. And other officials also admitted to receiving frequent correspondence from Gilbert raising these issues. As (b)(7) told OSC, “[W]ell, in the beginning when I started getting [Gilbert’s emails raising problems in infection control]... I was opening them all. But then I realized that I wasn’t attending to other priorities.” Ex. 32, p. 80. Thus, OSC finds that WAMC and (b)(6) had knowledge of Gilbert’s disclosures.

Moreover, Gilbert routinely informed (b)(6) and other WAMC officials of her disclosures to outside entities at or near the time that she made them. Ex. 43(D), p.11. For example, (b)(6) admitted that Gilbert told (b)(6) that she intended to report (b)(6) to the OIG for making her work outside the scope of her duties. Ex. 35(B), p. 130-134. (b)(6) also had complained to co-workers that Gilbert “sent the mock survey to joint commission and now they are after us, she always is writing the commander and telling the commander what is going on in this department, you know she’s always complaining...” Ex. 52, p. 26. Finally, (b)(6) acknowledged Gilbert told “everyone she was a whistleblower” and that she had” filed an IG complaint.” Ex. 35(B), pp.132-133.

#### **D. Gilbert’s Disclosures Significantly Motivated (b)(6);’s Personnel Actions**

OSC can meet its burden to demonstrate the causal connection between Gilbert’s disclosures and (b)(6)’s personnel actions against her through direct or circumstantial evidence. *See Herman v. Dep’t of Justice*, 119 M.S.P.R. 642, 650 (2013). Significant-motivating-factor causation may be inferred from different types of evidence including: (1) retaliatory animus or motivation; (2) the proximity in time between the protected disclosure or activity and the personnel action; and (3) inconsistencies in the stated reasons for the personnel action.<sup>3</sup>

Here, the evidence clearly demonstrates that (b)(6) took personnel actions against Gilbert *because* she made disclosures and engaged in protected activity. First, (b)(6) exhibited strong retaliatory animus against Gilbert following her disclosures, particularly after she challenged (b)(6)’s qualifications and shared the (b)(6) survey results with the Joint Commission. Second, (b)(6) began an escalating series of actions against Gilbert immediately following Gilbert’s contact with the Joint Commission. And third, (b)(6)’s explanations of (b)(6) treatment of Gilbert were inconsistent and contradicted by other VA employees with no motivation to lie.

##### **1. (b)(6); and WAMC Management Exhibited Strong Retaliatory Animus After Gilbert Complained to (b)(6). Management and the Joint Commission**

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<sup>3</sup>This list of factors is similar to those articulated in case law applying the “significant factor” standard under civil service laws and the “motivating factor” standard under the Uniformed Services Employment and Reemployment Rights Act. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Sheehan v. Dep’t of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Marshall v. Dep’t of Veterans Affairs*, 111 M.S.P.R. 5, 13 (2008).

Immediately after (b)(6) became (b)(6); (b)(7)(C), Gilbert complained to (b)(6), management, and the Joint Commission regarding (b)(6)'s lack of qualifications, and the significant problems in infection control at WAMC. Based on her disclosures, and to WAMC's surprise, the Joint Commission advanced the survey date by two months, giving WAMC management only one week's notice of its review. Ex. 43(A), p. 5. The Joint Commission then reported deficiencies of such significance that the Army Surgeon General considered shutting the hospital down and ordered a complete investigation. Finally, the Army's investigation concluded that (b)(6); was unqualified for (b)(6) position and that (b)(6)'s lack of qualification was the principal reason for the extremely serious infection control failures uncovered by the investigations. Gilbert's disclosures were serious, substantiated, and reflected negatively on (b)(6), giving (b)(6) a reason to have animus toward Gilbert and a motive to retaliate. *See Phillips v. Dep't of Transp.*, 113 M.S.P.R. 73, 83 (2010) (finding retaliatory motive where complaint's allegations reflected poorly on managers).

Not only did (b)(6) have reason to have animus toward Gilbert, (b)(6) actively exhibited such animus to Gilbert's co-workers. (b)(6); (b)(7)(C), who joined Infection Control in February 2014, and had no prior relationship with either (b)(6) or Gilbert, testified that (b)(6) was very upset that Gilbert had sent the mock survey results to the Joint Commission and blamed Gilbert for the Joint Commission's decision to move up the date of the survey. Ex. 52, pp. 21, 26-27. (b)(6) told (b)(6); that (b)(6) was upset with Gilbert because she was "throwing people under the bus." Ex. 52, p. 42. And, according to (b)(6);, (b)(6) made clear that (b)(6) wanted to "marginalize and dismiss" Gilbert. Ex. 52, p. 38. (b)(6); described (b)(6)'s impression of (b)(6)'s attitude toward Gilbert as, "I don't like her, so I don't want you to like her either. I don't talk to her, so I don't want you to talk to her either..." Ex. 52, pp. 21-22, 26, 29, 37, 41-42. (b)(6) expressed (b)(6)'s impression that (b)(6) wanted "to get rid" of Gilbert, saying, "There were times where (b)(6); would...imply that because of all the stuff that [was going on] Ms. Gilbert ...doesn't need to be here...in this department, they need to get rid of her, she's tearing this place down." Ex. 52, pp. 41-42. OSC found (b)(6); to be a credible witness to the retaliatory animus displayed by (b)(6) toward Gilbert.

## 2. There was Close Timing Between Gilbert's Protected Disclosures and the (b)(6)'s Personnel Actions

(b)(6) became (b)(6) in January 2014, and immediately thereafter Gilbert complained to (b)(6) and to management about the issues facing Infection Control, and her own conviction that (b)(6) was not qualified to be (b)(6). On January 14, 2014, Gilbert disclosed the mock survey results with the Joint Commission, and on January 24, 2014, she told (b)(6); that she had done so. *See supra* at 4. Immediately thereafter, (b)(6) began excluding Gilbert from key Infection Control meetings, including meetings with the Joint Commission.

Just two weeks after the Joint Commission concluded its on-site survey March 21, 2014 with an extremely negative out-brief to WAMC management, (b)(6) notified Gilbert that (b)(6) was restricting her to a half-day work schedule and would require her to take four hours of leave each day. Ex. 2(B6), pp. 3-4; Ex. 2(B7), pp. 12-13. Gilbert later cooperated with the Army investigation into the findings of the Joint Commission, the Report of Investigation of which was released on



May 30, 2014. Shortly thereafter, (b)(6) charged Gilbert twenty-eight hours of AWOL for not submitting leave slips for the leave she was required to take. *See Fitzgerald v. Dep't of Homeland Sec.*, 107 M.S.P.R. 666, 676 (2008) (holding that an inference of retaliatory intent can be drawn from evidence of suspicious timing). And following the Army ROI, (b)(6) engaged in the escalating series of personnel actions, including removing her authority to access patient records, placing her under investigation, and seeking her removal. *See supra* at 7.

### 3. (b)(6); Gave Inconsistent and Contradictory Explanations for (b)(7) Personnel Actions

During the course of OSC's investigation, (b)(7) offered several contradictory reasons for excluding Gilbert from Infection Control related meetings. (b)(6) denied (b)(7) did any of this because of animosity towards Gilbert's disclosures, claiming variously that (b)(7) never excluded Gilbert from meetings, that Gilbert chose not to attend the meetings, that Gilbert's absences from work precluded her attendance, and that all employees had access to the information anyway. Ex. 1(F), p. 1; Ex. 32(A), pp. 59-61; Ex. 32(B), pp. 27-29, 44-45; Ex. 35(B), p. 53. OSC obtained documentary evidence that contradicted each of these explanations. Specifically, there was email traffic in which Gilbert repeatedly requested to attend Infection Control meetings and (b)(6) explicitly denied those requests. Ex. 38(9B)-(9C), 42 (B)-(C). OSC determined that, contrary to (b)(7)'s contention, Gilbert was available to attend meetings but (b)(7) purposefully excluded her. Ex. 43(C), pp. 13-14, 19; Ex. 52, pp. 21-22. And, there was evidence that (b)(6) did not distribute information outside the meetings, thereby belying (b)(7)'s claim that all employees had access to the information from the briefings. Ex. 42(B)-(C); Ex. 43(A), p. 11.

Moreover, while (b)(6) told OSC investigators that (b)(7) had placed Gilbert on a half-day schedule based on (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) Ex. 2(B6)-(B7); Ex. 42(F); Ex. 43(C), pp. 23-47. When confronted, (b)(7) said (b)(7) was following instructions from HR Liaison (b)(6): (b)(6); (b)(7)(C). Ex. 35 (B), pp. 5,8; Ex. 43(A), p.11. (b)(6), however, contradicted (b)(7), testifying unequivocally that (b)(7) was not involved in the decision to keep Gilbert on a half-day schedule once (b)(6); (b)(6); (b)(7)(C) and, further, that it was illegal to force Gilbert to use leave under the circumstances. Ex. 58, p. 43. Similarly, (b)(6); disputed (b)(6)'s claim that (b)(7) had told (b)(6) to place Gilbert on AWOL when Gilbert did not submit leave slips. Ex. 58, pp. 57-58, 64. (b)(7) said management mishandled Gilbert's case and that (b)(7) eventually resigned over too many improper management tactics. As (b)(7) put it, "I was washing my hands of ...[what] was going on because it was just so much." Ex. 58, pp. 64.

(b)(6)'s decisions in late July to terminate Gilbert's access to patient files, detail her out of infection control, and investigate her for misconduct, were not supported by the results of investigations by the hospital, the Army, or OSC. *See discussion, supra* at 7. Rather, the results of those investigations demonstrated that (b)(6); (b)(7)(C) consistently denied to investigators having ever made a HIPAA complaint against Gilbert, and that Gilbert's access to the patients' files was consistent with the discharge of her normal duties. Ex. 1(C); Ex. 24, p. 1.



**E. (b)(6); Cannot Show that (b)(7) Would Have Taken the Same Personnel Actions in the Absence of Gilbert's Protected Activity**

Because the direct and circumstantial evidence described above demonstrates that Gilbert's protected disclosures were a significant motivating factor in the Army's multiple personnel actions against her, OSC has established a prima facie case of whistleblower retaliation justifying discipline. The burden thus shifts to (b)(6) to show that (b)(7) would have taken the same personnel actions against Gilbert in the absence of Gilbert's protected disclosures. 5 U.S.C. § 1215(a)(3)(B).

We conclude that (b)(6) cannot establish by preponderant evidence that (b)(7) would have taken the same personnel actions against Gilbert even had Gilbert not blown the whistle. As noted above, *supra* at 12, the reasons that (b)(6) gave for each of the personnel actions (b)(7) took were either inconsistent with the documentary evidence, inconsistent with (b)(6)'s own prior statements, or directly contradicted by other witnesses. The lack of clear and consistent explanations for contested personnel actions makes it difficult to prove that they were taken for a reason other than Gilbert's engaging in protected activity. Moreover, the facts showed a clear pattern of personnel actions that had the effect of restricting Gilbert's access to information concerning infection control practices by excluding her from meetings, eliminating her access to patient charts, limiting her to half-days in the workplace, detailing her out of the unit, and seeking her removal. There does not seem to be any logical explanation for this pattern of using personnel actions to limit access to information that formed the basis for Gilbert's disclosures other than that they were taken to prevent her from whistleblowing and therefore would not have been taken absent her protective activities. In short, (b)(6)'s pattern of retaliatory actions cannot be explained by causes independent of Gilbert's protected activity. Therefore, it is unlikely that (b)(7) could present an affirmative defense that (b)(7) would have taken those actions anyway.

**RECOMMENDATION FOR DISCIPLINARY ACTION**

While a single retaliatory personnel action is sufficient to warrant discipline, OSC's investigation found evidence that (b)(6) engaged in a pattern of retaliatory personnel actions against Gilbert. Based on these findings, OSC concludes that (b)(6) violated 5 U.S.C. § 2302(b)(8) and should be disciplined for committing prohibited personnel practices.

In mitigation, the evidence showed that (b)(6) was not prepared for the responsibility and challenge of managing the hospital's infection control program. (b)(6)'s lack of experience and credentials were cited as major factors in the program's failures. (b)(6)'s assignment was intended only to be temporary. The evidence also showed that higher-level officials at the hospital, from whom (b)(7) took direction, displayed such a lax attitude toward the program that they failed to take the mock survey or Gilbert's whistleblowing disclosures seriously.

Still, (b)(6)'s pattern of actions against Gilbert aggravated the seriousness of the hospital's infection control problems, increased the risk of harm to hospital patients, and likely served as a deterrence to others to blow the whistle on threats to patient health and safety. The latter is of

particular importance because the government depends on the courage of employees like Teresa Gilbert to speak up when they see dangers and inefficiencies, especially when patient health and safety is at stake.

OSC has jurisdiction to recommend that the Secretary of the Army take appropriate disciplinary action against (b)(6) for personnel actions (b)(6) took or threatened against Gilbert because of protected activity. 5 U.S.C. § 1215(c)(1). By statute, the Army is required to provide OSC with a report of the actions it takes or proposes against (b)(6) within 60 days of receiving this report. 5 U.S.C. § 1215(c)(2).